Far East Food Industries Sdn Bhd v PT Anekapangan Dwitama

COURT OF APPEAL (KUALA LUMPUR) — APPLICATION NO W–08–161 OF 1995
SHAIK DAUD, SITI NORMA YAAKOB AND ABU MANSOR JJCA
27 SEPTEMBER 1995

Civil Procedure *— Judgment — Judgment prepared by counsel to proceedings — Whether judge could delegate his judicial functions to others — Whether judge's conduct in inviting counsel to prepare draft judgment which was subsequently adopted as his own was proper — Whether delay should bar the applicant's complaint from being reviewed — Whether court, despite the delay, should consider the correctness or otherwise of the conduct complained of*

The respondent initiated proceedings against the applicant in the High Court by way of a winding-up petition on the ground that the applicant was unable to pay its debts (see [1995] 1 MLJ 21). The judge allowed the respondent's application to have a provisional liquidator appointed to manage the affairs of the applicant. The applicant appealed to the (then) Supreme Court and the appeal was pending. Subsequently, the judge directed counsel for the respondent to prepare a draft judgment for his consideration ('the directive'). A copy of the draft judgment was sent to counsel for the applicant and he was asked to comment on it. The applicant's counsel did not comment on the draft and the judge subsequently issued his written judgment ('the written judgment') which in substance was a reproduction of the draft judgment prepared by the respondent's counsel. Attached to the written judgment was another supplementary judgment issued by the judge giving reasons for making the direction to the respondent's counsel. The applicant filed a motion eight months after the learned judge gave his directive and issue the written judgment, seeking: (i) an extension of time to file the motion out of time; (ii) leave to file an appeal against the directive; (iii) to dispense with the filing of a formal record of appeal; and (iv) to treat the motion as a substantive appeal.

Counsel for the respondent raised a preliminary objection that the proceedings were misconceived as there was already an appeal pending in the now Federal Court and whatever mischief the judgment of the learned judge had done, had already been cured by the Federal Court when it ordered the removal of the written judgment from the records of appeal. The issue before the court was whether the act of requesting counsel of a successful party to tender a draft judgment which was later adopted by the learned judge as his judgment, was right and proper and could be accepted or condoned.

Held, allowing the appeal:

(1) (Per **Siti Norma Yaakob JCA**) The fact that the written judgment had been removed from the records was immaterial to

the issue as the motion was not over the substantive order made by the learned judge providing for the appointment of the provisional liquidator — for which the appeal was pending in the Federal Court — but on the directive given to counsel for the applicant to produce a draft judgment. What was before the Federal Court was a separate matter altogether and it had nothing to do with the propriety or impropriety of the judge's directive that was being questioned. Therefore, the preliminary objection was overruled (see pp 809I and 810A).

(2) (Per **Siti Norma Yaakob JCA**) Delay should not bar the applicant's complaint from being reviewed as once the conduct of any member of the judiciary is challenged, it becomes a grave matter of public concern as such a challenge invites public interest. It is therefore incumbent upon the court, the forum to which the complaint has been lodged, to consider the correctness or otherwise of the conduct complained of (see p 810D–E).

(3) (Per **Siti Norma Yaakob JCA**) The question in this case was not the effect of the draft judgment on the applicant, but the conduct of the judge himself in inviting the respondent's counsel to prepare a draft judgment which he later adopted as his own. The most important characteristic of a judge's judicial functions is the exercise of independent judgment and discretion. It is for this reason that a judge cannot, under any circumstance, delegate any of his judicial functions to anybody for whatever reason whatsoever. A judge cannot do justice to the parties before him if he appears to be partial to any party. The judge's conduct in inviting the respondent's counsel to prepare the draft judgment which was subsequently adopted as his own was highly improper and there was no justification for such a request to be made in the first place. It was on this ground that the appeal was allowed and the applicant was granted the four reliefs he sought (see pp 811E–H and 812D).

[Bahasa Malaysia summary

Penentang telah memulakan prosiding terhadap pemohon di Mahkamah Tinggi menerusi petisyen penggulungan berdasarkan alasan bahawa pemohon tidak mampu menjelaskan hutangnya (lihat [1995] 1 MLJ 21). Hakim membenarkan permohonan penentang untuk melantik seorang penyelesai sementara bagi mengurus hal ehwal pemohon. Pemohon merayu kepada Mahkamah Agung (pada masa itu) dan rayuan menunggu penyelesaian. Berikutnya, hakim mengarahkan peguam penentang untuk menyediakan penghakiman draf untuk pertimbangan beliau ('arahan tersebut'). Sesalinan penghakiman draf telah dihantar kepada peguam pemohon dan beliau diminta memberi ulasan atasnya. Peguam pemohon tidak memberi ulasan atas draf dan hakim kemudiannya mengeluarkan penghakiman bertulis ('penghakiman bertulis tersebut') yang pada dasarnya adalah penghasilan semula penghakiman draf yang disediakan oleh peguam

penentang. Dilampirkan bersama penghakiman bertulis tersebut adalah penghakiman tambahan lain yang dikeluarkan oleh hakim yang memberikan sebab mengapa arahan tersebut diberikan kepada peguam penentang. Pemohon memfailkan suatu usul lapan bulan selepas hakim yang bijaksana memberikan arahannya dan mengeluarkan penghakiman bertulis, yang meminta: (i) pelanjutan masa untuk memfailkan usul di luar masa; (ii) kebenaran untuk merayu terhadap arahan tersebut; (iii) pengetepian pemfailan rekod rayuan formal; dan (iv) untuk menganggap usul sebagai rayuan substantif.

Peguam penentang membangkitkan bantahan permulaan bahawa prosiding tidak dibawa dengan betulnya kerana sudah pun terdapat rayuan yang menunggu penyelesaian di Mahkamah Persekutuan kini dan apa sahaja keburukan yang telah diakibatkan oleh penghakiman hakim yang bijaksana, telah pun diubati oleh Mahkamah Persekutuan apabila ia memerintahkan pembatalan penghakiman bertulis tersebut daripada rekod-rekod rayuan. Isu di hadapan mahkamah adalah sama ada perbuatan dalam meminta peguam pihak yang berjaya supaya membentangkan penghakiman draf yang kemudiannya diterima-pakai oleh hakim yang bijaksana sebagai penghakimannya adalah betul dan wajar dan boleh diterima atau dibiarkan.

Diputuskan, membenarkan rayuan:

(1) (Oleh **Siti Norma Yaakob HMR**) Fakta bahawa penghakiman bertulis tersebut telah dipadamkan daripada rekod-rekod adalah tidak penting kepada isu kerana usul bukanlah tentang perintah substantif yang dibuat oleh hakim yang bijaksana yang memperuntukkan pelantikan penyelesai sementara — yang mana rayuan menunggu penyelesaian di Mahkamah Persekutuan — tetapi tentang arahan yang diberikan kepada peguam pemohon untuk menulis penghakiman draf. Apa yang ada di Mahkamah Persekutuan adalah perkara yang berasingan sama sekali dan ia tidak berkaitan dengan kesesuaian atau ketidaksopanan arahan hakim yang dipersoalkan. Maka, bantahan permulaan ditolak (lihat ms 809I dan 810A).

(2) (Oleh **Siti Norma Yaakob HMR**) Kelewatan tidak harus menghalang aduan pemohon daripada dikaji semula kerana sebaik saja kelakuan mana-mana ahli badan kehakiman dicabar, ia menjadi perkara kebimbangan umum yang disebabkan cabaran begitu melibatkan kepentingan awam. Dengan itu mahkamah, sebagai forum di mana aduan telah dikemukakan, wajib mempertimbangkan kelakuan yang diadu betul atau sebaliknya (lihat ms 810D–E).

(3) (Oleh **Siti Norma Yaakob HMR**) Persoalan dalam kes ini bukanlah kesan penghakiman draf pada pemohon, tetapi kelakuan hakim sendiri dalam meminta peguam penentang menyediakan penghakiman draf yang kemudiannya diterima-pakai sebagai kepunyaan beliau. Sifat yang paling penting dalam fungsi kehakiman seorang hakim adalah pelaksanaan penghakiman dan

budi bicara yang bebas. Atas alasan inilah seorang hakim tidak boleh, di bawah apa-apa keadaan pun, menugaskan sebarang fungsi kehakiman kepada sesiapa untuk apa-apa sebab. Seorang hakim tidak boleh bersikap adil kepada pihak-pihak di hadapannya sekiranya beliau memihak kepada mana-mana pihak. Perbuatan hakim dalam menjemput peguam penentang menyediakan penghakiman draf yang kemudiannya diterima-pakai sebagai penghakiman beliau sendiri sungguh tidak elok dan tiada justifikasi untuk permintaan demikian dibuat dari mula lagi. Berdasarkan alasan inilah rayuan dibenarkan dan pemohon diberikan keempat-empat relief yang dipohonnya (lihat ms 811E–H dan 812D).]

Notes

For cases on judgment, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1824–2030.

Legislation referred to

Companies Act 1965 s 218

Appeal from: Companies Winding-up No D2–28–357 of 1993 (High Court, Kuala Lumpur)

RR Sethu (*R Rajasingam* with him) (*RR Sethu*) for the applicant.
Matthias Chang (*Suhaimi Khor Zulkifli & Chang*) for the respondent.

Siti Norma Yaakob JCA: In this motion the applicant (the respondent in the court below) seeks four principal reliefs:

(1) Extension of time to file this motion out of time.

(2) Leave to appeal against the direction of Richard Talalla J, directing the respondent's solicitor to produce a draft judgment.

(3) The filing of the formal record of appeal be dispensed with.

(4) The motion be heard and disposed of as a substantive appeal.

Proceedings against the applicant were initiated by the respondent before Richard Talalla J by way of a winding-up petition pursuant to s 218 of the Companies Act 1965 on the ground that the applicant is unable to pay its debts (see [1995] 1 MLJ 21).

Subsequently, two applications came before the learned judge on 23 June 1994, one by the respondent to have a provisional liquidator appointed to manage the affairs of the applicant pending the disposal of the winding-up petition and the other by the applicant to have the petition struck out.

The parties agreed to have the respondent's application heard first and the other application by the applicant adjourned pending the outcome of another related action.

The learned judge allowed the respondent's application and ordered the appointment of a provisional liquidator to manage the affairs of the

A applicant pending the outcome of the petition. Dissatisfied, the applicant appealed to the (then) Supreme Court and the appeal is registered as Supreme Court Civil Appeal No 02–350–94 and this appeal is still pending.

It was following the lodgment of the appeal that the learned judge directed Ms LY Oon, counsel who appeared successfully for the respondent B in the application for the appointment of a provisional liquidator, to prepare a draft judgment on the order he had granted on 23 June 1994, for his consideration. It is in connection with this direction that the present proceedings are concerned.

Ms LY Oon duly complied with the learned judge's direction and on C 5 August 1994, the judge's secretary enclosed a copy of the draft judgment prepared by Ms LY Oon to Mr Rajasingam, counsel for the applicant, with a request to comment on it. That was the first occasion that Mr Rajasingam became aware of the learned judge's direction and he did not waste much time to express his horror at the impropriety of the course adopted by the learned judge and by letter dated 6 August 1994, he clearly intimated that D fact to the judge's secretary and declined to comment on the draft judgment. He also indicated that he was duty bound to seek his client's instructions on the matter.

Three days later on 9 August 1994, Mr Rajasingam was reminded by the judge's secretary that if he, Mr Rajasingam, did not respond to the E draft judgment within the next seven days or such further reasonable period, the learned judge would proceed to write his judgment which would also include a reference to the course he had taken.

Needless to say, Mr Rajasingam offered no comments to the draft judgment and on 22 September 1994, the learned judge issued his written judgment which in substance is a reproduction of the draft judgment F prepared earlier by Ms LY Oon. Attached to this written judgment was another judgment (the supplementary judgment) issued by the learned judge giving reasons for the course he had taken in directing Ms LY Oon as he did.

It is to protest against the impropriety of the directive given by the G learned judge to Ms LY Oon that the present motion was filed. At the outset of the hearing, Mr Matthias Chang, counsel for the respondent raised a preliminary objection that the present proceedings are misconceived as there is already an appeal pending in the now Federal Court and whatever mischief the judgment of the learned judge had done, had H already been cured by the Federal Court when it ordered the removal of the written judgment from the records of appeal.

That written judgment may well have been removed from the records but what we are concerned in this motion is not over the substantive order made by the learned judge providing for the appointment of the provisional liquidator, for which the appeal is still pending in the Federal Court, but I on the directive given to Miss LY Oon to produce a draft judgment. It must also be remembered that the order appointing the provisional liquidator was made on 23 June 1994 but the directive was given after 23 June 1994. What is before the Federal Court is a separate matter

altogether and it has nothing to do with the propriety or impropriety of the judge's directive that is now being questioned. That can only be challenged before us following the establishment of the Court of Appeal on 24 June 1994 and on that finding we had overruled Mr Matthias Chang's preliminary objection.

As this motion was only filed on 11 April 1995, eight months after the learned judge gave his directive and issued his written judgment on 22 September 1994, it is incumbent upon Mr RR Sethu, counsel for the applicant to explain the delay in filing the present proceedings. Mr Rajasingam, the applicant's instructing counsel in his affidavit in support of the motion, has explained that initially the applicant was reluctant to pursue the matter but only agreed to do so when it was explained that the propriety or impropriety of the directive concerns a matter of public interest.

Placed in the position of the applicant, we fully appreciate its reluctance to formally and publicly question the action of a senior member of the judiciary. However, considering the very nature of the complaint and that the judgment has been published in a number of law journals, we are of the opinion that delay should not bar the applicant's complaint from being reviewed as once the conduct of any member of the judiciary is challenged, it becomes a grave matter of public concern as such a challenge invites public interest and it is therefore incumbent upon us, the forum to which the complaint has been lodged, to consider the correctness or otherwise of the conduct complained of. It was based on these considerations that we:

(1) granted an extension of time to the applicant to file this motion out of time;

(2) granted leave to the applicant to file an appeal against the directive of the learned Judge directing Miss LY Oon to prepare the draft judgment;

(3) dispensed with the filing of a formal record of appeal as whatever papers that needed to be filed are already before us; and

(4) treated this motion as a substantive appeal.

Coming now to the merits of the appeal, Mr Matthias Chang, counsel for the respondent elected not to address the court after he unsuccessfully applied to have the appeal adjourned. We had subsequently allowed the appeal and we now give our reasons for having decided so.

The only issue raised in this appeal is whether the act complained of, ie requesting counsel of a successful party to tender a draft judgment which was later adopted by the learned judge as his judgment, is right and proper and can be accepted or condoned. I need to stress here that what is under scrutiny is the nature and character of the judicial act itself rather than the character of the person performing it.

In his supplementary judgment, the learned judge justified his action in the following manner:

> The invitation to counsel for the applicant to prepare a draft judgment was made in order to expedite the final resolution of the dispute between the

parties. The invitation was made openly through the normal channel of the judge's staff. There was nothing surreptitious about it.

The invitation was made on the following premises: firstly, the unquestioned integrity and good faith of the court and both counsel; secondly, that counsels' primary duty is to the court and not to the litigant counsel represents and as such counsel is amicus curiae, as per Lord Reid in *Rondel v Worsley* [1969] 1 AC 191; thirdly, the matter was decided on affidavit evidence and questions of credibility and demeanour of witnesses did not arise and accordingly the appellate court will be in just as good a position to decide this matter as I was able to, the appellate court being in no way fettered by my decision; fourthly, the opportunity to be heard in regard to the draft judgment was always intended to be provided and this was eventually done and fifthly, the order had been made, it was a fait accompli, and the judge was functus officio except only to give grounds for his decision.

With respect, we cannot accept his reasoning as he was approaching the issue on the premise that the applicant, now the appellant, was not prejudiced by the draft judgment prepared by the respondent's counsel. This is clear when he posed and answered the following question, when considering the cause of action he had taken:

> A pertinent question to ask is what prejudice has the respondent (ie the appellant before us) suffered as a result of the draft judgment prepared by counsel for the applicant (ie the respondent before us). As far as I can see, none.

We consider this approach to be highly erroneous as what is being questioned is not the effect of what the draft judgment has on the appellant but the conduct, per se, of the learned judge himself in inviting (as was the term used by the learned judge) the respondent's counsel to prepare a draft judgment which he later adopted as his own. Is such conduct acceptable?

We emphatically say 'no' for the following reasons.

In the exercise of his judicial functions, a judge does a balancing exercise when deciding and resolving disputes between opposing parties or interests. Thus, hearing a case, making a decision on the case and supporting a decision with reasoned arguments and findings by way of an oral or written judgment form part and parcel of a judge's judicial acts or functions. The most important characteristic of his judicial functions is the exercise of independent judgment and discretion. It is for this very reason that a judge cannot, under any circumstance, delegate any of his judicial functions to anybody for whatever reason whatsoever. In the exercise of his judicial functions, a judge is expected to do justice to the parties appearing before him. He cannot do so if he appears to be partial to any party as justice must not only be done but must be seen to have been done.

In this case, the request to prepare the draft judgment was made to the respondent's counsel, the party who had successfully obtained the order, on which the judgment is based, without the knowledge of counsel for the appellant. The reason why counsel for the appellant was not approached is stated by the learned judge to be as follows:

> Counsel for the applicant was invited to prepare the draft judgment rather than counsel for the respondent because the submission of the former when appearing before me was far more comprehensive on the facts and the law than that of the latter.

The draft judgment runs into 16 pages and the learned judge has adopted relevant parts of the draft judgment as his judgment dated 22 September 1994.

A perusal of the draft judgment shows that it contains more than the mere marshalling of facts and law. It contains the findings of the court as expressed by counsel of the successful party. We are mindful that the learned judge had already made an order on which the draft judgment is based but we do not know what considerations and findings the learned judge had placed on the submissions made by counsel for the parties, other than that expressed in the draft judgment for which the learned Judge is not the author.

It is to protect the impartiality and integrity of the court below that we had intervened and ruled that the learned judge's conduct in inviting counsel for the respondent to prepare the draft judgment, which the learned judge subsequently adopted as his own, was highly improper and that there is no justification for such a request to have been made in the first place. On that finding, we had allowed this appeal but made no order as to costs.

Abu Mansor JCA: I have had the benefit of reading the judgment in draft of Siti Norma Yaakob JCA with which I agree. I associate myself, with respect, with it and agree that the appeal be allowed with no order as to costs.

Appeal allowed.

Reported by David Lai